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No. 09-333

In the Supreme Court of the United States

GUADALUPE L. GARCIA, ET AL., PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 5 U.S.C. 704 precludes petitioners' claims under the Administrative Procedure Act alleging that the United States Department of Agriculture (USDA) systematically failed to investigate administrative complaints of discrimination in lending programs because Congress specifically prescribed an "adequate remedy" for this injury by retroactively extending the limitations period for filing certain types of discrimination claims against USDA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) in these consolidated cases is reported at 563 F.3d 519. The interlocutory order of the district court in *Love* v. *Connor* (Pet. App. 25a-37a) is reported at 525 F. Supp. 2d 155. The interlocutory order of the district court in *Garcia* v. *Veneman* (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009. A petition for rehearing was denied on June 18, 2009 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on September 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Hispanic and female farmers, filed suits alleging that, since 1981, the United States Department of Agriculture (USDA) discriminated against them in the administration of its farm benefit programs and failed to act on their discrimination complaints as required by USDA regulations, in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 5a. Petitioners sought to pursue their claims as a class action, but the district court denied class certification based on lack of commonality and dismissed petitioners' failure-to-investigate claims brought under ECOA. *Id.* at 40a-67a, 68a-92a. The United States Court of Appeals for the District of Columbia Circuit affirmed in prior appeals. *Id.* at 40a-67a, 68a-92a.

On remand, the district court considered petitioners' failure-to-investigate claims under the APA. Pet. App. 5a, 28a. The district court dismissed those claims, holding that the APA does not permit direct judicial review here because Congress provided to petitioners an adequate alternative remedy by retroactively extending the statute of limitations period to allow certain types of discrimination complaints to proceed against USDA. *Id.* at 31a-36a. Petitioners filed an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals affirmed the district court's dismissal of the failure-to-investigate APA claims. Pet. App. 9a-19a.

1. USDA administers a variety of credit and benefit programs through the Farm Service Agency (FSA). See Consolidated Farm and Rural Development Act, 7 U.S.C. 1921 *et seq.*; 7 C.F.R. 2.42(28); Pet. App. 44a, 73a. Like its predecessor the Farmers Home Adminis-

tration (FmHA), the FSA is authorized to make and guarantee loans to farmers who cannot obtain credit from commercial institutions. *Id.* at 44a-45a, 73a-74a. At the times relevant to this case, applications for loan programs were submitted to, and processed by, the FmHA's and the FSA's county offices, which determined whether an applicant was eligible for a loan. *Ibid.*; see also 7 C.F.R. 1910.3-1910.4 (1997).

Since 1966, USDA has had regulations prohibiting discrimination on various bases (including sex, race, and national origin) in the administration of any of its programs and activities. See 7 C.F.R. Pt. 15d; 31 Fed. Reg. 8175 (1966) (promulgating 7 C.F.R. 15.52 (1967), the predecessor to 7 C.F.R. 15d.4). The regulations permit a farmer who believes he or she has been discriminated against to file a complaint with either the USDA Secretary or the USDA Office of Civil Rights. Pet. App. 45a, 74a. Although the USDA component charged with investigating discrimination complaints has varied somewhat over the years, see, *e.g.*, 31 Fed. Reg. 8,175 (1966) (Office of the Inspector General); 50 Fed. Reg. 25,687 (1985); 54 Fed. Reg. 31,163, 31,164 (1989) (Office of Advocacy and Enterprise); 64 Fed. Reg. 66,709, 66,710 (1999) (Office of Civil Rights), the relevant component has always been authorized to take necessary corrective action if it concludes that a discrimination complaint has merit, 7 C.F.R. 15d.4; 7 C.F.R. 15.52(b) (1997).

In addition to USDA's administrative avenues for processing and investigating complaints of discrimination, aggrieved parties may seek relief in federal district court under ECOA, which makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction * * * on the basis of race, color, religion, national origin, sex or mari-

tal status, or age." 15 U.S.C. 1691(a)(1). ECOA authorizes successful plaintiffs to recover damages from creditors—including the federal government, see *Moore* v. *USDA*, 55 F.3d 991, 994 (5th Cir. 1995) (holding that ECOA waives sovereign immunity of United States)—as well as costs and attorneys fees. 15 U.S.C. 1691e(a) and (d). ECOA plaintiffs are not required to exhaust administrative remedies prior to filing suit. Pet. App. 75a; see 63 Fed. Reg. 62,962, 62,963 (1998). However, ECOA includes a two-year statute of limitations. 15 U.S.C. 1691e(f).

In the mid-1990s, USDA commissioned several studies and investigations in response to allegations that it had engaged in race, gender, and national origin discrimination. One such investigation, conducted by USDA's Civil Rights Action Team, produced a report (the CRAT Report) finding that USDA had, over the course of a number of years, accumulated a significant backlog of discrimination complaints that needed prompt action. See *Pigford* v. *Glickman*, 206 F.3d 1212, 1214-1215 (D.C. Cir. 2000).

Congress responded to the CRAT Report by enacting, on October 21, 1998, a special remedial statute governing non-employment-related complaints that had been filed with USDA before July 1, 1997, and that alleged that discrimination had occurred between January 1, 1981, and December 31, 1996. Pet. App. 6a-7a; *id.* at 177a-179a; Act of Oct. 21, 1998, Pub. L. No. 105-277, § 741, 112 Stat. 2681-30 to 2681-31 (Section 741) (codified at 7 U.S.C. 2279 note). Section 741 extended the statute of limitations for filing such claims of discrimination to two years from its enactment (*i.e.*, to October 21, 2000). Pet. App. 177a. Congress's purpose in enacting Section 741 was to provide a remedy for individuals who

claimed to have been victims of discrimination in the 1980s and early 1990s because Congress found that USDA's processes for reviewing civil rights complaints "did not function effectively" during much of the those decades. 63 Fed. Reg. 67,392 (1998); see also 144 Cong. Rec. 23,276-23,277 (1998) (statement of Sen. Robb).

The practical effect of Section 741 was to resurrect a number of discrimination claims against USDA that would otherwise have been time-barred. Congress achieved that goal by providing two distinct and alternative avenues by which claimants could seek relief. First, Section 741(a) extended until October 21, 2000, the time in which an individual with an eligible claim could file suit in federal district court under ECOA. Section 741(a), 112 Stat. 2681-30; Pet. App. 7a. Second, Section 741(b) created a new administrative remedy that allowed individuals to "seek a determination on the merits of the[ir] eligible complaint" by USDA "in lieu of filing a civil action," provided they sought such relief by October 21, 2000. Section 741(b), 112 Stat. 2681-30 to 2681-31; Pet. App. 7a. Subsection (b) required USDA to timely process renewed administrative complaints, to investigate the claims therein, and to issue merits determinations—including the awarding of appropriate relief—after a hearing on the record. *Ibid.* Subsection (b) also directed USDA to issue decisions in such cases within 180 days if possible, and specified that USDA's denial of any such claim is subject to de novo judicial review in federal court. *Ibid.*

2. Days before the October 21, 2000 deadline, petitioners—a putative class of Hispanic farmers (the *Garcia* petitioners) and a putative class of female farmers (the *Love* petitioners)—filed separate actions in federal district court under, *inter alia*, ECOA, alleging that

USDA discriminated against them in a variety of lending programs from 1981 through 1996. Pet. App. 7a, 27a-28a. In so doing, petitioners elected to proceed under Section 741(a) rather than renewing their administrative complaints before the agency pursuant to Section 741(b). Although petitioners chose to forego the administrative review of their claims, petitioners also asserted claims under the APA that USDA failed properly to investigate their earlier administrative complaints of discrimination. *Id.* at 7a-8a, 28a. Petitioners in each case sought to proceed as a class action under Federal Rule of Civil Procedure 23.[1]

In separate rulings in *Love* and *Garcia*, the district court denied petitioners' motions for class certification. Pet. App. 128a-156a, 157a-173a. Petitioners filed interlocutory appeals pursuant to Federal Rule of Civil Procedure 23(f) and 28 U.S.C. 1292(b), and the court of appeals affirmed the denials of class certification in both cases. Pet. App. 51a-65a, 78a-89a. The court of appeals also affirmed the district court's dismissal of petitioners' claim under ECOA that USDA failed to investigate discrimination complaints, finding that such action does not

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[1] At roughly the same time that petitioners filed their ECOA claims in these cases, a putative class of Native-American farmers filed a separate ECOA action in district court alleging discriminatory conduct by USDA similar to the conduct alleged here. See *Keepseagle* v. *Veneman*, No. 99-3119, 2001 WL 34676944 (D.D.C. Dec. 12, 2001). The district court in *Keepseagle* certified a class action under Federal Rule of Civil Procedure 23(b)(2) on the ground that the failure-to-investigate claim asserted in that case presented a common issue among the class members. *Id.* at *12-*15. The court of appeals dismissed USDA's interlocutory appeal under Federal Rule of Civil Procedure 23(f) and refused to reach what it characterized as the "merits" question of whether the failure-to-investigate claim was cognizable under the APA. See *In re Veneman*, 309 F.3d 789, 793-796 (D.C. Cir. 2002).

qualify as a "credit transaction" under ECOA. *Id.* at 66a, 89a-91a. The court of appeals declined, however, to exercise jurisdiction over petitioners' appeal from the dismissal of their failure-to-investigate claims under the APA. Noting that "the class certification issues took most of the trial court's and the parties' attention," the court concluded that "this claim will benefit from further development in the district court." *Id.* at 66a; see *id.* at 91a.

On remand, the district court reconsidered whether petitioners' allegations that USDA had previously failed to investigate their discrimination complaints are cognizable under the APA, and held that they are not. Pet. App. 31a-36a. The court noted that "[t]he APA provides for judicial review only where plaintiffs have 'no other adequate remedy in a court.'" *Id.* at 31a (quoting 5 U.S.C. 704). Because the court found that "Congress has expressly addressed the exact injury of which plaintiffs complain, and provided a 'special' and 'adequate' remedy for their wrong," *ibid.* it concluded that plaintiffs were not permitted to seek review of that injury directly under the APA. *Id.* at 31a-36a. The court found that the remedy Congress provided in Section 741 is "plainly 'adequate,'" because it not only extended "all applicable periods of limitation for those prejudiced by agency inaction," but "also allowed any eligible complainant to 'seek a determination on the merits of the eligible complaint by the Department of Agriculture'—in other words, to take up her complaint again with the agency." *Id.* at 32a (quoting Section 741(b)). Because Congress provided twin avenues of relief—renewed administrative complaint or judicial action under ECOA—to remedy any injury caused by USDA's alleged failure to investigate complaints of discrimination, the court

held that 5 U.S.C. 704 precludes petitioners from asserting failure-to-investigate claims under the APA. Pet. App. 32a-36a.

3. With permission from the district court and the court of appeals, petitioners filed an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and a unanimous panel of the court of appeals affirmed. Pet. App. 1a-19a. The court noted that the APA, through 5 U.S.C. 704, permits judicial review of "final agency action" that is not expressly made reviewable by statute only when "there is no other adequate remedy in a court." Pet. App. 9a (quoting 5 U.S.C. 704). Relying on this Court's holding in *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988), that 5 U.S.C. 704 precludes APA review of agency action when Congress has otherwise provided a "special and adequate review procedure," Pet. App. 9a, the court concluded that the remedy provided in Section 741 is sufficient to preclude APA review of petitioners' failure-to-investigate claims, *id.* at 9a-16a.

The court reasoned that, "[b]y extending the statute of limitations for administrative complaints and by providing for judicial review of USDA's determinations, Congress provided [petitioners] an adequate remedy in court within the meaning of the APA." Pet. App. 12a. The court noted that "there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit." *Id.* at 11a. The court explained that "Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative complaint with the USDA with subsequent judicial review if

the USDA denied relief." *Ibid.* The court held that, because petitioners elected to proceed directly to district court under Section 741(a), 5 U.S.C. 704 precludes them from simultaneously pursuing an APA claim seeking "declaratory and injunctive relief that the USDA should have investigated their old, unrenewed administrative complaints." Pet. App. 12a. The court reasoned that allowing plaintiffs to proceed as petitioners wished "would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints." *Id.* at 13a. The court observed that petitioners could have "renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative process." *Ibid.* Had they chosen this option, they would also have been able to compel any agency action that was unreasonably delayed. *Id.* at 13a-14a. The court of appeals found that it was not free to rewrite Section 741 by eliminating the provision requiring "eligible complainants to make a choice between two remedial regimes." *Id.* at 14a.

The court also held that petitioners' APA claims would be independently barred even if they were correct that it was futile to pursue the available administrative avenue of relief because petitioners had an adequate statutory remedy in ECOA. Pet. App. 14a-18a. "Under the ECOA," the court explained, "to the extent [petitioners] can offer proof that the USDA discriminated against them in the administration of its credit programs, [petitioners] will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief." *Id.* at 14a.

Such a remedy, the court concluded is "adequate to preclude a cause of action under the APA." *Ibid.*

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Initially, the interlocutory posture of this case makes it unsuitable for further review at this time. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). On remand, petitioners will be able to pursue their individual discrimination claims against USDA under ECOA and may well receive all of the relief to which each is entitled through that avenue of relief. If, when the district court issues a final order as to a particular petitioner's claims, that petitioner remains unsatisfied with her inability to pursue a failure-to-investigate claim directly under the APA, she may seek this Court's review of the ultimate disposition of her individual case at that time.

2. Petitioners' primary contention is that the court of appeals' interpretation of 5 U.S.C. 704 conflicts with this Court's interpretation of that provision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). Petitioners are mistaken.

a. The Court in *Bowen* considered, *inter alia*, the interplay of two different provisions of the APA—5 U.S.C. 702 and 5 U.S.C. 704. 487 U.S. at 891, 901-908. As a general matter, the APA provides a cause of action to challenge agency action in federal district court, subject to certain restrictions. District courts have juris-

diction over such suits pursuant to 28 U.S.C. 1331, see *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 n.47 (1979); and 5 U.S.C. 702 expressly waives the United States' sovereign immunity to such suits to the extent they do not seek money damages, see *Darby* v. *Cisneros*, 509 U.S. 137, 152 (1993). Judicial review under Section 704 is limited, however to "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. 704. As this Court explained in *Bowen*, Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." 487 U.S. at 903 (quoting Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 101 (1947)).

The Court in *Bowen* described the APA's place among other types of review of federal administrative action:

> At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.

487 U.S. at 903 (footnotes omitted). Petitioners rest their entire argument (see Pet. 10-17) on the final phrase of that passage—"previously established special statutory procedures relating to specific agencies"—arguing that Section 704 precludes judicial review of agency action *only* when an adequate alternative remedy already existed at the time the APA was enacted. But the quoted passage merely describes the types of adequate alternative remedies Congress intended to be sufficient to preclude resort to the APA (remedies that by definition must have existed prior to the APA in order for Congress to have had them in mind) as a way of introducing the Court's discussion of why the alternative remedy that the United States argued was adequate in that case (*i.e.*, review in the Court of Claims) was not, in fact, adequate.

There is no basis for construing the Court's language in *Bowen* as imposing a temporal restriction on the types of alternative remedies that would preclude resort to the APA under Section 704. The opinion in *Bowen* makes clear that Congress's intent in enacting Section 704 was to authorize judicial review of final agency action where no other adequate remedy is available. 487 U.S. at 902-903. That intent remains the same regardless of whether the adequate alternative remedy in question in a particular case came into being before or after the APA was enacted. As petitioners note (see Pet. 12-17), the D.C. Circuit has an unbroken chain of precedent interpreting Section 704 and *Bowen* as preventing plaintiffs from seeking judicial review of agency action under the APA when the plaintiffs have an alternative adequate remedy. See, *e.g.*, *El Rio Santa Cruz Neighborhood Health Ctr.* v. *HHS*, 396 F.3d 1265, 1270 (2005); *National Wrestling Coaches Ass'n* v. *Depart-*

ment of Educ., 366 F.3d 930, 945-948 (2004); *Washington Legal Found.* v. *Alexander*, 984 F.2d 483, 486 (1993); *Women's Equity Action League* v. *Cavazos*, 906 F.2d 742, 750-751 (1990); *Council of & for the Blind* v. *Regan*, 709 F.2d 1521, 1531-1533 (1983) (en banc). In fact, petitioners do not cite a single case endorsing their view of *Bowen* or 5 U.S.C. 704.

b. Petitioners attempt (Pet. 14-15) to ground their proposed temporal restriction in 5 U.S.C. 559 (Section 12 of the APA as enacted, 79th Cong., ch. 324, 60 Stat. 244), which provides: "Subsequent statute may not be held to supersede or modify * * * chapter 7 [5 U.S.C. 701 *et seq.*] * * *, except to the extent that it does so expressly." See Pet. App. 174a-175a. Although petitioners do not spell out their argument in detail, presumably they mean to suggest that a statutory remedy enacted after the APA can never preclude a plaintiff from seeking review of agency action under the APA unless the statute explicitly states its intention to do so. But that reading of 5 U.S.C. 559 misunderstands its plain text.

Statutory remedies enacted after the APA preclude petitioners' use of the APA to seek review of administrative action when the remedies are "adequate" within the meaning of 5 U.S.C. 704. The fact that such an adequate remedy's enactment post-dates the APA's does not mean that the later-enacted remedy "supersede[s] or modif[ies]" Section 704 within the meaning of 5 U.S.C. 559. With or without the later-enacted remedy, Section 704 still requires that an alternative remedy be "adequate" in order to preclude the use of the APA. The relevant question as to such a post-APA remedy is the same as it was in *Bowen* as to the pre-APA remedy: is it "adequate" within the meaning of Section 704? Thus, the court of appeals' interpretation of the meaning of

5 U.S.C. 704 is perfectly consistent with this Court's decision in *Bowen*.[2]

3. Petitioners also argue (Pet. 18-26) that the court of appeals erred in holding that the remedies Congress provided in Section 741 are adequate and therefore preclude petitioners' filing of an APA action simultaneously with their ECOA actions. Petitioners do not contend that the court of appeals' decision on that issue directly conflicts with any decision of this Court or of any other court of appeals. Even if they could identify such a conflict, the court of appeals' decision would not warrant further review at this time because it is correct.

Petitioners do not dispute that Congress enacted Section 741 specifically to address the past deficiencies in USDA's investigation of discrimination complaints. Section 741 offers eligible farmers a choice of remedies: (1) they can pursue their claims that USDA discriminated against them in its lending programs directly under ECOA in federal district court, Section 741(a); or (2) they can resurrect their original complaint by filing a renewed administrative complaint with USDA, Section 741(b). Petitioners all opted for the first choice, filing the underlying actions in district court under ECOA.

Petitioners argue (Pet. 18-19) that ECOA is not an adequate remedy because, as both the district court and the court of appeals found, plaintiffs cannot pursue their failure-to-investigate claims under ECOA. But that argument misses the point. Petitioners *can* pursue their

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[2] In any event, because petitioners did not argue to the court of appeals that *Bowen* requires different treatment of alternative remedies enacted after the APA compared with remedies enacted prior to the APA, they waived that argument. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

discrimination-in-lending[3] claims in district court directly under ECOA, and do not contend that ECOA is not an adequate remedy for those grievances. Petitioners' claims of discrimination are at the heart of this dispute, and ECOA entitles prevailing parties to money damages and attorneys fees, as well as declaratory and injunctive relief. Pet. App. 14a. The court of appeals correctly held that petitioners' ability to sue USDA directly in federal court for discrimination in the administration of its lending programs is an adequate alternative remedy within the meaning of 5 U.S.C. 704.

Petitioners also argue (Pet. 21-26) that the alternative remedy provided in Section 741(b)—the ability to file a renewed administrative complaint with USDA, the resolution of which will be subject to de novo judicial review—is inadequate and, therefore, cannot preclude petitioners' filing suit directly under the APA to assert their failure-to-investigate claims. As an initial matter, petitioners do not even attempt to explain why they can only be made whole by pursuing failure-to-investigate claims that are separate and apart from their discrimination claims under ECOA. Petitioners' discrimination-in-lending claims form the basis of their cases and they do not dispute that ECOA is an adequate remedy for those claims.

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[3] Petitioners argue (Pet. 18-19) that the court of appeals' determination that ECOA is an adequate remedy for petitioners' claims is erroneous because some petitioners raise, as the court of appeals described them, "APA claims that the USDA discriminated in dispersing non-credit disaster benefits, which are not covered by Section 741." Pet. App. 19a. Because the district court remanded those claims for further proceedings in the district court, however, *ibid.*, they are not properly before this Court for further review.

Instead, petitioners argue (Pet. 22-25) that USDA's administrative complaint process—a process none of them opted to pursue—continues to be plagued by problems and inefficiencies. Even if that were true (which the government does not concede), it would not undermine the adequacy of petitioners' remedy under ECOA. The result of USDA's failure over two decades to investigate claims of discrimination in lending by the agency and its subunits was that farmers who believed they had suffered discrimination in the agency's programs had nowhere to turn to seek redress. Congress fixed that problem by retroactively extending the statute of limitations under ECOA for those farmers, and petitioners took advantage of that solution. The fact that Congress also provided an alternative revised administrative process—a process in which none of petitioners opted to participate—does not affect the adequacy of petitioners' renewed opportunity to file ECOA claims in district court.

4. Finally, petitioners contend (Pet. 26) that review by this Court is warranted because principles of fairness and equity demand that they be allowed to pursue the same remedies in the exact same procedural posture (*e.g.*, a class action) as the African-American farmers in *Pigford* and the Native-American farmers in *Keepseagle*. But the suitability of petitioners' claims for disposition as class actions was not before the court of appeals in this appeal and is not before this Court now. Petitioners appealed the district court's denial of motions to certify classes in a previous appeal, see Pet. App. 40a-67a, 68a-92a and chose not to seek certiorari review by this Court at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2009